Substance Abuse Policy

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Introduction

Increased awareness of the impact of drug and alcohol use in the workplace has caused many employers to consider developing a substance abuse policy: a policy to deal with impairment, possession, use or addiction to alcohol or illicit drugs.

An employer may consider developing a substance abuse policy for many reasons:

- an employer has a legal duty to ensure the health, safety and welfare of employees; the development of a substance abuse policy may be an important step in providing a safe workplace;
- an employer has an interest in monitoring substance abuse in the workplace in order to avoid vicarious liability for the conduct of an impaired employee;
- an employer may wish to establish clear rules and procedures regarding alcohol use in the course of employment and at company sponsored events to avoid social host liability; and
- an effective substance abuse policy can promote greater workplace productivity, retention of skilled employees and employee wellness.

This paper will address the best practices for developing a substance abuse policy as well as the appropriate content of such policies.

Case Study #1

Facts

The employee, a thirty-eight year old man, was a Registered Nurse in an Intensive Care Unit. He used to abstain from alcohol, tobacco and drugs, but after a severe emotional upset he began taking analgesic narcotics.

At the beginning, he took small amounts of the drug through wastage (the portion of drug that accumulates in the syringe after being administered to the patient) but soon progressed to obtaining drugs in a variety of other ways including under dosing patients, fraudulent record keeping,
misrepresentation, and dual entries. A year and a half later, he realized he was addicted but could not stop.

After his wife discovered that he was addicted, he began seeing an addictions counsellor but was still unable to stop taking drugs. Shortly thereafter, the hospital discovered what he was doing.

When confronted about the losses, the employee admitted everything. He explained how he became addicted and apologized to management for the harm that he had caused but assured them he had never taken any of the drugs at work (he did, however, admit that the drugs may have impaired his cognitive functioning from time to time). He also made a real commitment to rehabilitation, saying that he had started counselling and was prepared to enter a full-time treatment program.

At the request of the union, the employee was placed on sick leave. He then entered and completed a five-week treatment program for addicted health care professionals. After he returned home, he began attending Narcotics Anonymous meetings four times per week and embarked on the 12-step program of recovery. Nevertheless, he was terminated by the employer for “theft of narcotics, falsification of hospital and patient records and non-compliance with hospital policy.”

**Decision**

The foregoing facts are taken from *Castlegar & District Hospital Society v. B.C.N.U.* (1997), 64 L.A.C. (4th) 107 (Larson). The employee grieved his termination and asked to be reinstated. He expressed the view that the failure to reinstate him would be tantamount to saying that “addictions are not diseases but are self-inflicted behavioural and moral problems.” The employer did not dispute that the grievor was addicted to drugs or that drug addiction is a genuine illness. Rather, it argued that the employee should not be reinstated because he engaged in a systematic program of theft and deception, which converted the matter into one of culpable conduct.

The arbitrator ordered that the employee be reinstated on the basis that the drug addict is not only physically and psychologically dependent on the drug, but also, unable to control the drive to get the drugs. In the words of the arbitrator, “what the grievor did to get the drugs was an integral part of his addiction and ... must be treated ... as a manifestation of the illness.”
Case Study #2

Facts

The employee was a blaster at a mining operation in northern British Columbia. One day, while on duty, the employee used cocaine. An industrial drug screen test revealed a cocaine concentration 240 times greater than the concentration required to establish impairment.

Given the nature of his duties and the serious safety-related considerations, the employer viewed his transgression as one demanding an urgent response. After a meeting with the employee and his union representative, the employer agreed not to terminate him on certain conditions. In a letter to the employee, the employer stated:

…the results of this test indicate, and by your own admission, that you were impaired on the job site that day. This caused you to be unfit for work in any capacity. However, in your capacity as a blaster, you are aware that this is a very serious employment infraction and a culpable act worthy of termination.

The letter went on to say that the employee could continue in employment if he successfully completed the Assessment and Referral Service program and provided a written statement from a physician indicating that he was fit to return to work. The employee entered the Assessment and Referral Service program but continually missed appointments and did not fully commit himself to rehabilitation. As a result, the employer terminated his employment. The union grieved the termination and about a year later, he provided evidence that he had been sober for seven months. He also provided evidence that he was determined to continue with his sobriety and that his prognosis was good.

Decision

These facts are taken from Re Quintette Operating Corp. (1996), 57 L.A.C. (4th) 356 (Taylor). The arbitrator dealt with the issue of accommodation in the context of an alcohol or drug dependency. He stated that the reasonable accommodation principles which have evolved under human rights legislation are applicable in this context but added the caveat that employees who are addicted to alcohol or drugs have “a duty to facilitate the search for a reasonable accommodation through rehabilitation.”

Applying these principles to the case at hand, he found that the employee’s drug dependency resulted in an unacceptable standard of conduct and work performance especially insofar as it created a safety
risk. He then stated that, in encouraging the employee to seek assistance and enter the rehabilitation program, the employer had treated the dependency as an illness and fulfilled its duty of accommodation.

He concluded that “the employer has discharged its onus of establishing that it had just cause for dismissing the Grievor and the facts support the conclusion that at the time of his dismissal there was no likelihood that he would be fit to return to work in the foreseeable future.” The arbitrator accordingly denied the grievance.

**Case Study #3**

**Facts**

In the case of *Kemess Mines Ltd.* (2005), 139 L.A.C. (4th) 305 (Munroe), an employee was dismissed from his position at a copper and gold mine in northern British Columbia for smoking marijuana in his room at the mine, contrary to the zero tolerance policy for possessing or consuming drugs or alcohol on site.

**Decision**

The arbitrator held that the substance abuse policy developed by the mine took into account the relevant safety legislation — in this case, the *Mines Safety Code* — and reflected the safety-sensitive culture of the mining company. However, the company did not adequately take account of the relevant human rights legislation. While the Arbitrator recognized the safety-sensitive culture of the company and the need to deter others from violating the company substance abuse policy, he ruled that these legitimate interests could be accommodated without dismissing the employee.

The employee was reinstated with a 10 month unpaid suspension and subject to several conditions such as completing a treatment program, remaining abstinent, and submitting to random searches in the bunkhouse.
Best Practices For Developing A Substance Abuse Policy

The development of a well-considered substance abuse policy is the first step in establishing a framework for decision-making and action. There is no typical substance abuse policy. Rather, in the words of Barbara Butler:

> [E]ach one will reflect the unique corporate culture and values of the company or organization, the fundamental aspects of the business it engages in, the regulatory environment within which it must operate, and most important, its specific program needs.¹

The development of a substance abuse policy need not be a complex matter. To the contrary, a common sense approach that allows input (but not necessarily agreement) from those who will administer the program as well as those covered by the policy should be the guiding principles.

The following steps should be considered when developing a substance abuse policy.

1. **Establish Policy Goals and Objectives**

   Establishing clear goals and objectives provides a foundation for the development and implementation of the substance abuse policy. The reasons for developing a policy will vary according to the nature of the company or organization. In the second case study, for example, public and workplace safety would be key considerations in the policy development process. Other reasons for developing a policy include “reducing associated liabilities, improving productivity, addressing security concerns, meeting regulatory environments, responding to a known problem in the company, enhancing employee morale, and following industrial trends.”²

   Whatever the reasons for developing a policy, it is important for the employer to set out what it wants to achieve. Not only does this allow the employer to ensure that the final product meets these objectives, it also allows the employer to evaluate (and modify) the policy over time.

2. **Determine Who Should Be Involved**

   Consider all the people who ultimately will be affected by the policy or have an interest in its contents. Then consider building the policy from the ground up and involving as many of those people as possible in the development process.

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² Ibid.
Stakeholders with the most direct interest are employees, unions, and other representative bodies. At this stage, it is important to point out that, while input from the union should be sought, it may not be advisable to seek the actual agreement of the union. It is usually best for the employer to maintain control over the development, content and implementation of the policy. That will help to ensure achievement of management objectives and will prevent an erosion of management rights.

Another group to include in the process is the managers and supervisors who will be administering the policy; they will have an important perspective on the internal resources of the company as well as their ability to effectively administer the policy.

3. **Determine the Specific Needs of the Workplace**

There is no “typical” substance abuse policy. Each substance abuse policy must be tailored to the company or organization developing the policy. While the specific needs of the workplace must be taken into account when establishing the goals and objectives of the policy, a more detailed examination of these needs must take place in the policy development process. The employer must review:

- the current policy, collective agreement, available resources
- the degree of risk and safety concerns in operations,
- past incidents and accidents,
- the regulatory environment in which the company operates,
- other external factors such as customer requirements, industry trends and community attitudes; and
- the values and culture of the company or organization.

An examination of these elements will give the employer an idea of the present situation and what needs to be done in order to achieve the objectives of the policy.

In the first case study, the employer would need to review a host of internal and external factors in developing an effective substance abuse policy. The potential liability of the hospital for the actions of its employees and the regulatory scheme for pharmaceutical drugs would be important considerations in developing a policy. However, as illustrated by the outcome of that case, the employer would also have to be cognizant of the relevant human rights and labour legislation and decisions of courts, labour boards and arbitrators.
4. **Draft a Policy that Responds to Identified Needs**

The policy should be as short as possible, simply written and easily understood. The policy should identify and address substance abuse problems in the workplace without being too prescriptive; in other words, it should be flexible enough to respond to each individual situation.

At this stage, it may be advisable to circulate the draft policy to the stakeholders for comments. The policy should also be reviewed by legal counsel to ensure that it is in keeping with laws, regulations and recent human rights and arbitration cases. The appropriate content of the policy will be discussed below.

5. **Test, Integrate, Evaluate and Train**

Once the draft policy has been circulated and an implementation date is set, it is critical to ensure that the requirements and processes of the policy are sufficiently integrated. In the words of Barbara Butler, a substance abuse policy should ideally:

> complement and support other existing policies, practices and departments, such as human resources/personnel, benefits, safety and security, occupational health, and existing EAP and referral systems (including peer prevention programmes). ³

The integration of the policy may also include training or educating the workforce about substance abuse and the resources available to employees. A plan for the evaluation of the substance abuse policy should also be developed at this stage to ensure that the policy is meeting its stated objectives.

However, it is important to note that, in maintaining records for evaluation, the company must comply with the *Personal Information Protection Act*, S.B.C. 2003, c. 63. Notably, section 13(3) provides that “[a]n organization must notify an individual that it will be collecting employee personal information about the individual and the purposes for the collection before the organization collects the … personal information.”

6. **Establish Parallel Expectations for Contractors**

The rights and obligations of independent contractors raise interesting and important legal issues that are beyond the scope of this presentation. However, it is clear that companies have an obligation to ensure that anyone working on their site or on their behalf, whether that person is an employee or a

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contractor, is meeting safety standards and a corresponding obligation to take action if they are not (see *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, specifically, sections 2.1 and 4.19-4.20). For these reasons, it is recommended that an employer establish parallel expectations for contractors in a separate document. For example, the Alberta Alcohol and Drug Abuse Commission recommends that the document “set out the rules and steps that will be taken to investigate a policy violation, and consequences of a violation, as well as any conditions that must be met before a contractor is allowed to return to your worksite or to work.”

**Appropriate Content Of A Substance Abuse Policy**

There is no “typical” substance abuse policy. Rather, each substance abuse policy must be tailored to the company or organization developing the policy. In general, however, the policy should be as short as possible, simply written, and easily understood; it should identify and address substance abuse problems in the workplace without being too prescriptive; in other words, it should be flexible enough to respond to each situation.

One of the animating themes is the distinction between employee behaviour and misbehaviour — that is, the distinction between culpable and non-culpable conduct. And the substance abuse policy, in word, process and practise, must always meet the test for a *bona fide* occupational requirement (“BFOR”) and be sensitive to employees’ rights of privacy, confidentiality and dignity.

A complete approach to the problem of substance abuse in the workplace encompasses three broad considerations:

- prevention;
- early identification and access to assistance; and
- enforcement.⁴

The prevention of substance abuse in the workplace can be accomplished by focusing on health promotion and education about the adverse consequences of alcohol and drug abuse. Access to assistance can take the form of an employee assistance program or another counselling service; however, treatment, rehabilitation and follow-up programs must also be available. An enforcement

⁴ These three considerations were discussed in Butler, *ibid.* at 503.
procedure (or procedures) aimed at preventing the availability of prohibited substances or their abuse in contravention of company policy are also needed as part of a complete approach to the problem. More specifically, a substance abuse policy should include the following elements.

1. **Statement of Policy Goals and Objectives**

The substance abuse policy should begin with a statement of the policy goals and objectives with particular emphasis on establishing a safe and healthy work environment. Each substance abuse policy must be tailored to the company or organization developing the policy. However, the statement should indicate a desire to secure a safe workplace and a commitment to assisting employees in the identification and treatment of addiction and substance abuse. The following statement (slightly modified) is an example of a statement of policy goals and objectives:

This company has an obligation to the public to provide safe, reliable and efficient service. As well, it endeavours to provide a safe and healthy work environment and promote the general health and well being of its employees.

In order to achieve these goals, and to have a safe workplace free from drugs and alcohol, this company does not tolerate consumption or possession of drugs or alcohol by employees while on duty or on company property or impairment by any means while on duty. In order to maintain an appropriate corporate image, employees are prohibited from purchasing or consuming alcohol or drugs while wearing a company uniform, including while off duty.

This company recognizes abuse of or addiction to alcohol and/or drugs as a serious health problem. The Company is committed to assisting employees in their identification of and obtaining treatment for substance abuse and/or addiction problems with the ultimate goal of employees returning to work in good health and with satisfactory work performance.

The following is an alternative statement of policy goals and objectives:

This company acknowledges that alcohol or drug abuse or addiction is a serious medical, social, public health, and employment problem, which can be treated by existing medical and therapeutic methods. The company encourages early treatment and rehabilitation as vital to the
ongoing viability of the employment relationship. This policy addresses instances of alcohol and drug abuse which affect the job performance of the individual, his/her co-workers, or the safety of the workplace.

2. Define the Scope and Application of the Policy

An effective substance abuse policy must define the scope and application of the policy in clear and precise terms. The policy must explain who is covered, when, and under what circumstances. If necessary, it must set out any risk or safety sensitive positions and explain why employees in these positions are subject to higher standards.

For the most part, the policy will apply to all employees of the company or organization but it may be advisable to state that the policy applies to both union and non-union employees. The scope and application of the policy should be tailored to the unique structure and needs of the company developing the policy.

3. Specify the Standards that Employees are Expected to Meet

One of the most important elements of an effective substance abuse policy is a simply written and easily understood statement about the standards that employees are expected to meet when on company business, premises or worksites.

More specifically, the policy should address the standards that employees are expected to meet with respect to impairment and the use and possession of illicit drugs, alcohol and prescription medications. The standards should be formulated such that the objectives identified in the policy development process are satisfied. The policy should also set out clear standards for scheduled call-in and emergency call situations (this may be a key consideration in the third case study discussed above). Specific exceptions should also be set out; for example, the company may wish to introduce different standards for social events, business meetings and travel situations. However, the company should always be aware that it may be vicariously liable for any negligent or wrongful acts committed by an employee acting in the course of employment and may also have liabilities associated with the provision of alcohol to others or the hosting of events where alcohol is served. Indeed, there is a trend towards liability for anyone who provides alcohol or hosts events where people are drinking. As such, it is advisable to determine what limitations the company wants to place on various social events.

Exceptions to these general rules are one reason that a “zero tolerance” policy must be carefully considered. If there are higher standards for employees in safety sensitive positions, those standards
must be set out clearly. The following is an example of the standards which employees may be expected to meet:

It is the responsibility of every employee to arrive at work fit for duty and to conduct himself or herself in a safe and lawful manner while on duty. It is the responsibility of every employee not to use drugs or alcohol or be impaired by drugs, medication or alcohol while at work. It is the responsibility of every manager, supervisor and employee to promote and maintain an alcohol and drug-free workplace in the interests of health and safety. It is the responsibility of all employees to ensure that the workplace is free from the adverse effects of the use of alcohol or drugs, or the misuse of medication. Employees who become aware of conduct by another employee which is contrary to this policy, and that poses an immediate threat to the safety or health of any employee, the public, or damage to equipment, must inform the company.

Similarly, Barbara Butler recommends the following statement of responsibilities:

Employees are expected to arrive at work fit for duty, without performance altering levels of drugs or alcohol in their systems. Employees are expected to perform their jobs in a safe manner and as such, use of company-specified chemical substances is prohibited. Employees taking medications that may affect their work performance must report this information to the medical department (or supervisor) before beginning work. [Finally], employees are expected to conduct themselves in a lawful manner while on company property or business, and to this end, use, possession, or distribution of an illegal substance is prohibited.  

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5 *Ibid.* at 505.
4. **Set Out the Procedures to be Followed in the Event of a (Possible) Violation**

An effective substance abuse policy will also set out the procedures which are to be followed in the event of a possible policy violation. These procedures include:

- intervening in situations of declining performance;
- investigating if there are grounds to believe an employee is unfit on the job;
- escorting an employee, contractor or visitor off the site;
- reporting that an employee has received an impaired driving charge while operating a company vehicle and investigating such incidents;
- searching company property if there is reason to believe that an employee is in possession of banned substances in the workplace; and
- alcohol and drug testing.

In following these procedures, the company must be careful to use investigative techniques that are effective and reliable while at the same time ensuring that they have acted with due diligence in dealing with any potential safety risks. In addition, the company must be careful not to alienate the workforce or violate privacy rights.

As the investigation conducted by the company may lead to disciplinary action, the employer must gather the evidence, consider all the elements of the violation and be satisfied there is no reasonable explanation for the conduct. If the matter ultimately goes to arbitration, the onus is on the employer to prove that the employee violated the policy. Moreover, if the allegation contains elements of criminal misconduct or moral turpitude, the trier of fact will scrutinize the evidence with greater care and will require clear, cogent and convincing evidence.

Perhaps the most controversial aspect of substance abuse in the workplace is drug and alcohol testing. On the one hand, drug and alcohol testing may be an essential tool for ensuring that the objectives of the policy are satisfied. To that end, many employers see testing as a tool to ensure a safer and healthier work environment. On the other hand, drug and alcohol testing may cause concerns regarding an employee’s right to privacy and may potentially lead to discrimination based on disability. These issues are being fully explored in another session in this conference.
5. Set Out the Consequences for a Policy Violation

An effective substance abuse policy must also set out the consequences for a violation of the policy. At this stage, it is essential to distinguish between culpable and non-culpable conduct.

An employer is entitled to sanction an employee who violates the policy as the result of culpable conduct. Depending on the severity of the violation and the relevant safety considerations, the sanctions may include documentation of the incident, suspension with or without pay, demotion or other disciplinary action up to and including dismissal.

On the other hand, an employer must make a good faith attempt to accommodate an employee who violates the policy as the result of non-culpable conduct. The courts have consistently held that the employer must accommodate the employee to the point of undue hardship and the first case study makes it clear that non-culpable conduct related to the addiction may go beyond the use or possession of drugs or alcohol to include conduct that is related to the drive to get the alcohol or illicit drugs.

Many cases are not easily classified as culpable or non-culpable. Most fall into the “hybrid” category: the employee’s addiction contributed to his breach of the substance abuse policy, but the employee is not completely unable to control his conduct.

The third case study is a good example: the employee habitually smoking marijuana in the mining camp had to be given a chance to deal with his illness, and the employer’s zero tolerance policy had to accommodate that effort. As the BC Court of Appeal said:

> I agree that it is important not to diminish the employer’s legitimate safety concerns and the incentive for addicted employees to come forward and seek assistance voluntarily, before they breach the drug policy. However, ... I am not persuaded that the deterrent force of the policy will be seriously undermined by the arbitrator’s proposed accommodation.6

Last chance agreements are an interesting component of substance abuse policies. Such agreements may be a useful incentive for employees who have experienced problems with substance abuse in the workplace. However, last chance agreements should be treated with caution — especially when the substance abuse is non-culpable — given that the employee may not be able to control his addiction (or as seen in the first case study above, his behaviour that relates to the addiction). In these types of situations, a last chance agreement could be used but the employer should recognize the very real

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6 *Kemess Mines Ltd.*, 2006 BCCA 58, at para. 47
likelihood that the employee will fail at least once. An employer should be prepared to accommodate an employee who, while making a genuine effort, is not able to follow the provisions of the last chance agreement.

A sad postscript to Case Study #1, is that the employee failed two “last” chance agreements and lost his job at the Castlegar hospital. He continued recovery efforts and got a nursing job at another hospital. He failed again and repeated his past behaviour to fuel his addiction. He was fired again and the Court of Appeal upheld that dismissal, stating:

... Mr. Bergen had received two prior employment opportunities to cope with his addiction, and had failed to do so. The employer’s duty to accommodate Mr. Bergen was matched by his duty to facilitate the accommodation process.... Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program ... Mr. Bergen failed to discharge that duty, and the duty to accommodate was exhausted.7

6. Set Out the Resources for Prevention, Assistance, Treatment and Follow-Up

One of the most important components of an effective substance abuse policy is the provision of resources for prevention, assistance, treatment and follow-up. Before discussing the typical resources that are available, it is important to underscore the point that the effectiveness of these resources often depends on the level of knowledge about them in the workplace. If the employees who have a substance abuse problem are not educated about and aware of the various resources that are available, the substance abuse policy will not be as effective. As such, the substance abuse policy should set out the resources that are available internally and externally and the company should take further steps to educate its employees about these resources.

Education and awareness about substance abuse is an essential element of prevention. An effective education component of the substance abuse policy will include education about how to recognize the signs of substance abuse (in oneself and in others) and how to get help (or encourage others to get help).

A helpful adjunct to an effective substance abuse policy is an employee assistance program (“EAP”). An EAP may include initial counselling and assessment services that can help employees get the assistance they need for their specific problems. In many cases, these programs also provide training, education, and consultative services to managers and supervisors so that they can better deal with employees. Some EAPs provide treatment for employees with substance abuse problems, and in others.

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7 Health Employers Association of BC (Kootenay Boundary Regional Hospital), 2006 BCCA 57.
the company will sponsor treatment. In all situations, however, it is critical for the company to clearly set out (in the substance abuse policy itself and in all correspondence with the employee) the terms under which treatment will be sponsored and the period of time that the position will be held for the employee while he is receiving treatment. ⁸

Finally, an effective substance abuse policy will set out the resources available to the employee upon his return to work. The employee may not be able to control his addiction upon his return to work, even with the best treatment. To that end, the substance abuse policy should “establish a system for return-to-work assessment and follow-up procedures to support the recovery of the returning employee. The policy should also state whether these procedures are mandatory.” ⁹

**Conclusion**

The development of a substance abuse policy need not be an overly complex matter. A common sense approach that allows input from stakeholders is advisable. The policy itself should be simply written and easily understood. It should identify and address substance abuse problems in the workplace without being overly prescriptive. It should meet legal requirements for the proper handling of substance abuse and incorporate the latest information available.

While the policy should include certain components — including a statement of policy goals and objectives, the scope and application of the policy, the standards that employees are expected to meet, the procedures to be followed in the event of a violation, the consequences of a violation, and the resources for prevention, assistance, treatment and follow up — each policy should be tailored to the particular company or organization.

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⁸ See generally Butler, *ibid.* at 507.
⁹ *ibid.*